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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1955.

No. 862

THE COMMERCIAL TRAVELERS MUTUAL ACCIDENT ASSOCIATION OF AMERICA, a corporation organized under the laws of the State of New York, with its home office at Utica, New York,

Petitioner,

vs.

J. C. SCHUTT, Administrator of the Estate of JOHN P. BELL, deceased, JANE BELL, FRANCES BELL EBLING and MARGARET BELL DOUGLAS, Residents of Davidson County, Tennessee,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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THE REPORTER COMPANY, INC., Walton, N. Y.—1956

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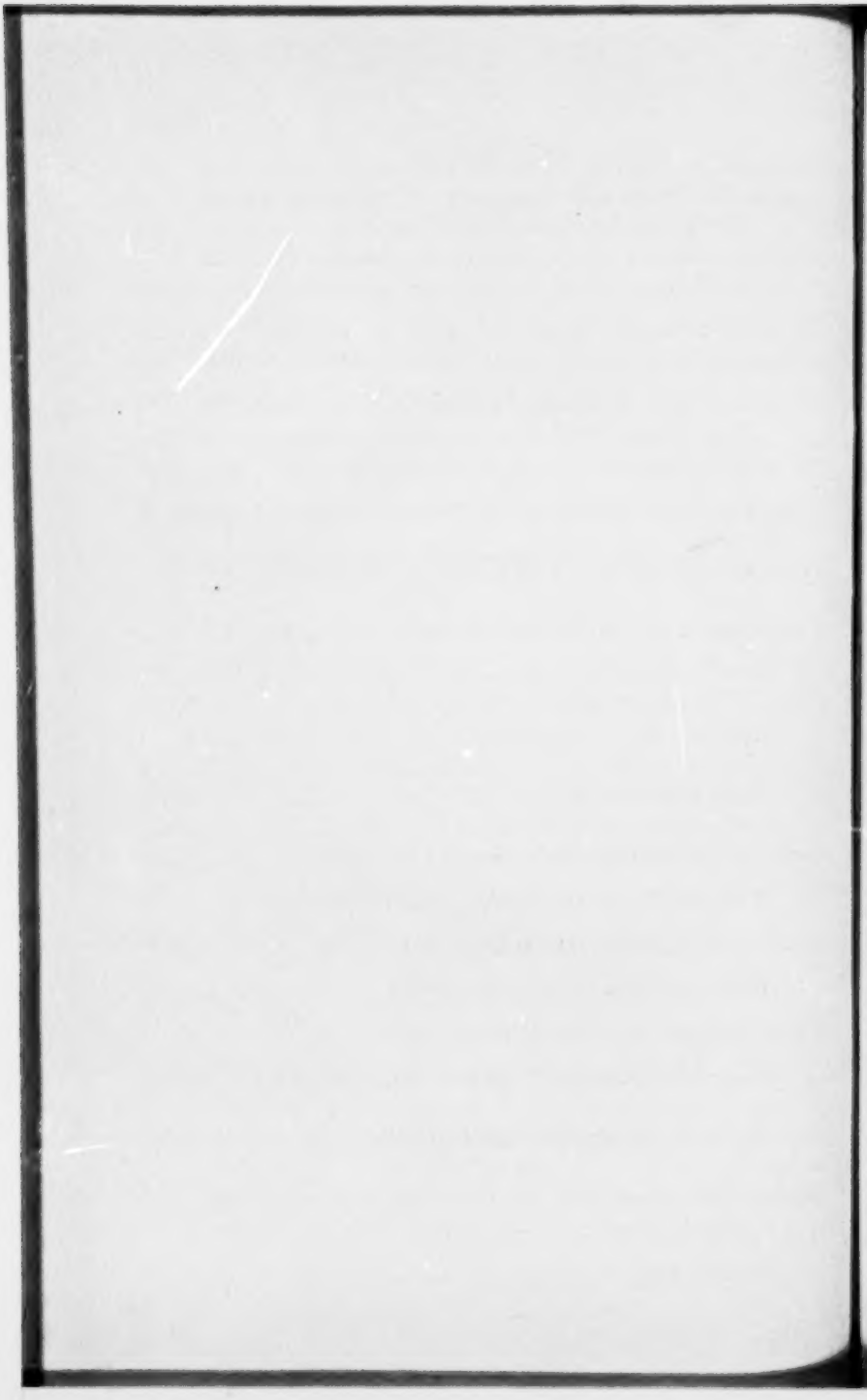

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on January 17, 1956.

Opinions Below.

The opinion of the District Court for the Northern District of New York, and the opinion of the Court of Appeals for the Second Circuit, both of which are appended hereto in Appendix A, were unreported as of the date of this petition.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was made and entered on January 17, 1956, and copy thereof appended to this petition in Appendix A at page 33. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

Questions Presented.

Respondents have sought to enforce, in the United States District Court for the Northern District of New York, a judgment against petitioner obtained in Part II of the Chancery Court of Davidson County, State of Tennessee. Service of process in the Tennessee action purports to have been made upon petitioner pursuant to the provisions of Chapter 119 of the Public Acts of the State of Tennessee, 1947, the pertinent provisions of which are set forth in Appendix B.

Upon failure of petitioner to appear in the Tennessee action, the judgment, which is the basis of the District Court cause of action involved in the present proceeding, was granted by default. It includes $10,000.00, the face amount of an insurance policy, with interest, together with the further sum of *$2,500.00 adjudged by the Court as a penalty* pursuant to Laws of Tennessee, 1901, Chapter 141, Section 1, on the theory that defendant's failure to pay was in bad faith.

Upon petitioner's motion, the District Court granted an order dismissing the second cause of action, the one involved in this proceeding, upon the ground that the Tennessee Court lacked jurisdiction because the statute under which service of process was attempted was inapplicable to petitioner. This determination coincided with a similar decision of the United States Court of Appeals for

the Fifth Circuit in the case of *Parmelee v. Commercial Travelers Mutual Accident Association* (the petitioner herein), 206 Fed. 2d 523, holding that a similar Florida statute did not apply under similar circumstances. Upon appeal, in the present proceeding, the Court of Appeals for the Second Circuit nevertheless reversed the decision of the lower Court.

This case presents for review the following questions, all of which are of the greatest importance not only to the petitioner, but also to the entire insurance industry and to the public:

1. Conflict between decisions of Court of Appeals for the Second Circuit and Court of Appeals for the Fifth Circuit.

How can the decision of the United States Court of Appeals for the Second Circuit, holding that a Tennessee statute subjects petitioner to the jurisdiction of the State Courts of the State of Tennessee and to the imposition of a $2,500 penalty, and that such a statute is merely procedural, be reconciled with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Parmelee v. Commercial Travelers Mutual Accident Association, supra,* holding that a similar Florida statute did not apply under similar circumstances?

2. Tennessee statute is not retroactive.

Is the effect of this Tennessee statute retroactive to such an extent that it can be utilized *ex post facto* to subject petitioner to service of process and to the imposition of penalties of $2,500 in Tennessee, under a contract or policy entered into with a Kentucky assured prior to the date of the enactment of the Tennessee statute?

3. Statutory attempt to acquire jurisdiction over non-resident corporation by substituted service of process.

Does not a Tennessee statute which provides for substituted service of process upon a non-resident corporation not physically present within the State of Tennessee violate the due process provisions of the Fourteenth Amendment of the Constitution of the United States?

4. Infringements of Tennessee statute upon petitioner's constitutional rights.

Does not a Tennessee statute which subjects petitioner to the jurisdiction of Tennessee Courts for acts performed in New York State and which imposes penalties upon petitioner not otherwise recoverable either under the terms of a New York Contract or New York Law:

(a) Violate the due process provisions of the Fourteenth Amendment to the Constitution of the United States?

(b) Impair the obligations of the contract in contravention of Clause 1, Section 10, Article I of the Constitution of the United States?

(c) Deny full faith and credit to the laws of the State of New York in violation of Section 1, Article IV of the Constitution of the United States?

5. Unconstitutional attempt to regulate and limit use of United States mail.

Does not a Tennessee statute which asserts that the Courts of Tennessee shall *ipso facto* acquire jurisdiction over any New York citizen who deposits in the United

States mail within the State of New York a letter of solicitation or containing any contract, to a Tennessee resident, infringe upon the constitutional right and obligation of the Congress of the United States to regulate the United States mail in accordance with Clause 7, Section 8, Article I of the Constitution of the United States?

Constitutional Provisions and Statutes Involved.

The following provisions of the United States Constitution and sections of the Tennessee statutes which are involved herein are set forth in Appendix B hereto:

United States Constitution.

Article I, §8, cl. 7	(1 USC p. xxxv)
Article I, §10, cl. 1	(1 USC p. xxxv)
Article IV, §1	(1 USC p. xxxvii)
Amendment XIV, §1	(1 USC p. xxxix)

Laws of Tennessee.

Laws of 1901, Chapt. 141, §1.
(Williams Tennessee Code §6434—Vol. 4 p. 592)

Laws of 1947, Chapt. 119, §§1-8.
(Williams Tennessee Code §§ 6459.48-6459.55 Vol. 4 Supp.)

Statement.

Petitioner has been sued in the United States District Court for the Northern District of New York by respondents, who have jurisdiction in the District Court upon diversity of citizenship, who allege two causes of action. In their first cause of action, respondents seek to recover the sum of $10,000 from the defendant under the provisions of a certain accident policy issued by the defendant to John P. Bell on July 29th, 1942. This first cause of action is entirely unrelated to and unaffected by the appeal to the Court of Appeals for the Second Circuit. In their second cause of action, respondents seek to recover the amount of a judgment obtained by them against the defendant in Part II of the Chancery Court of Davidson County in the State of Tennessee. This judgment was rendered in an action commenced by the service of a summons and complaint upon the Insurance Commissioner of the State of Tennessee as the alleged agent of defendant pursuant to the provisions of Chapter 119 of the Public Acts of Tennessee of 1947.

The summons and complaint were thereafter forwarded to the defendant at its home office in Utica, New York, by registered mail by the Insurance Commissioner as required by the statute. There being no appearance on behalf of the defendant, a judgment was entered in the sum of $10,000, the amount of the policy, together with interest in the sum of $328.32 and the further sum of $2,500 penalty, pursuant to Laws of Tennessee of 1901, Chapter 141, §1.

Defendant is a domestic membership association organized under the provisions of the Insurance Law of the State of New York, with its home office in Utica, New York, and is authorized to grant personal acci-

dent and health insurance to its members, subject to the supervision of the Department of Insurance of the State of New York (R. p. 19a). Defendant has no office, officer, agency, agent or other employee or representative of any kind in the State of Tennessee (R. p. 19a). It owns no real or personal property in that state. It has never transacted business there, and has never applied for or obtained a license to transact business in said state, and has never designated any public official or private individual to accept service of process in its behalf, or to appear voluntarily in any litigation instituted in that state against it (R. p. 20a). It transacts its business entirely by mail, and all its contracts, either with its prospects or its members, are by mail. Its members are elected in Utica, New York, upon application submitted to the home office at Utica. The membership certificate constituting the insurance contract is issued to the new member at Utica, and is mailed to him at whatever address the member designates. Notices of assessments required to pay the cost of insurance protection are mailed from time to time from Utica to the member at his designated address, and payment of such assessments is received at the home office. The insurance contract is made in Utica, New York, and claims arising under it are submitted to the Association at its home office, where payment thereof is made by check mailed to the member from the Utica post office (R. p. 20a).

John P. Bell, the assured, under whose certificate or contract the cause of action in this case is originally alleged to have arisen, became a member of the defendant Association in December, 1937. At the time that the contract of insurance was issued to him, he was a resident of the State of Kentucky, not of Tennessee (R. p. 21a). While a resident of the State of Ken-

tucky, he submitted by mail to the defendant three separate claims, all of which were paid to him by checks mailed to him at his address in Winchester, Kentucky (R. p. 21a). In July, 1942, while still a resident of Winchester, Kentucky, he applied for a new certificate of membership providing for enlarged insurance protection. This application was granted, and the new certificate was mailed to him at his address in Winchester, Kentucky.

Some time later, Mr. Bell moved to Tennessee. The only contact that defendant has ever had with him since he moved into Tennessee has been to mail notices of assessment to him from time to time, which up to the date of his death, were paid by remittances received by the defendant at the home office in Utica (R. p. 22a).

The insurance contract itself provides that it is a New York contract; that all notices going to the member are to be delivered and filed at Utica, New York; and that claims are to be paid at Utica (R. p. 22a).

In 1947, the State of Tennessee enacted Chapter 119 of the Public Acts of the State of Tennessee for the year 1947, the pertinent provisions of which are set forth in the appendix hereto.

On October 8th, 1951, John P. Bell died. Thereafter the plaintiffs, as beneficiaries under the insurance contract, brought an action against the defendant, laying the venue in Part Two of the Chancery Court of Davidson County of Nashville, Tennessee. Plaintiffs claim that the sections of the Tennessee statute referred to above are applicable against the defendant. They therefore

claim that the Commissioner of Insurance of the State of Tennessee is the designated agent of defendant to accept service of process, and consequently that service of process made by said plaintiffs in the Tennessee action upon the Commissioner of Insurance is adequate service upon defendant. Having thus served the summons upon the Commissioner of Insurance, the plaintiffs obtained a judgment by default upon defendant's failure to appear in the action. It is upon this judgment that respondents seek to recover in their second cause of action. It is to be noted that this judgment contains a penalty in the sum of $2,500 imposed by the Court under the provisions of Laws of Tennessee, 1901, Chapter 141, §1.

Upon motion of the petitioner, an order was granted by the District Court dismissing the second cause of action upon the ground that the Chancery Court of Davidson County in Nashville, Tennessee, obtained no jurisdiction over the defendant to grant the judgment which is the subject of the second cause of action. In reversing the judgment of the District Court the Court of Appeals for the Second Circuit took the position that the Tennessee statute was entirely dissimilar to the Florida statute construed in *Parmelee v. Commercial Travelers Mutual Accident Association* at Am. 206, Fed. 2nd 523, and that in any event the Tennessee statute was procedural, rather than substantive in nature.

REASONS FOR GRANTING THE WRIT.

A. The decision of the Court of Appeals for the Second Circuit is in direct conflict with the decision of the Court of Appeals for the Fifth Circuit on the same matter in a similar case.

The Court of Appeals for the Second Circuit has decided that the Tennessee statute involved herein and the Statute of Florida known as the Unauthorized Insurers Process Law* are entirely dissimilar for the purposes of this case. The distinction which the Court draws, however, is more illusory than real.

The Florida statute was considered in *Parmelee v. Iowa State Traveling Mens Association,* 206 F. 2d 518, and *Parmelee v. Commercial Travelers Mutual Accident Association of America,* 206 F. 2d 523. In the latter

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* Florida Statutes of 1951:

625.30 Service of process upon unauthorized insurer.—

(1) Any of the following acts in this state, effected by mail or otherwise, by an unauthorized foreign or alien insurer: (a) The issuance or delivery of contracts of insurance to residents of this state or to corporations authorized to do business therein, (b) the solicitation of applications for such contracts, (c) the collection of premiums, membership fees, assessments or other considerations for such contracts, or (d) any other transaction of the business of insurance, is equivalent to and shall constitute an appointment by such insurer of the insurance commissioner of this state and his successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit, or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contract of insurance, and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this state upon such insurer.

(2) Such service of process shall be made by delivering to and leaving with the insurance commissioner or some person in apparent charge of his office two copies thereof and the payment to him of such fees as may be prescribed by law. The insurance commissioner shall forthwith mail by registered mail one of the copies of such process to the defendant at its last known principal place of business, and shall keep a record of all process so served upon him. Such service of process is sufficient, provided notice of such service and a copy of the process are sent within ten days thereafter by registered mail by plaintiff or plaintiff's attorney

case this petitioner had issued a policy of insurance to a resident of Kentucky and sent the policy to him by mail addressed to his Kentucky residence. Thereafter the insured moved to Florida where he resided until his death in 1951. It was held by the Court of Appeals for the Fifth Circuit that the Florida statute did not apply to the Association since the certificate of insurance had not been delivered in Florida to a Florida resident subsequent to the effective date of the Florida statute.

(Cont.)
to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

625.31 Defense of action by unauthorized insurer.—

(1) Before any unauthorized foreign or alien insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, such unauthorized insurer shall either (a) deposit with the clerk of the court in which such action, suit or proceeding is pending cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in such action, provided, however, that the court may in its discretion make an order dispensing with such deposit or bond where the insurer makes a showing satisfactory to such court that it maintains in a state of the United States funds or securities, in trust or otherwise, sufficient and available to satisfy any final judgment which may be entered in such action, suit or proceedings, and that such insurer will pay any final judgment rendered without requiring suit to be brought on such judgment in the state where such securities are located, and that if, nevertheless, such suit shall be brought on such final judgment the insurer shall waive all defenses thereto; or (b) procure a certificate of authority to transact the business of insurance in this state.

(2) The court in any action, suit, or proceeding, in which service is made in the manner provided in subsections (2) or (3) of §625.30 may, in its discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of subsection (1) of this section and to defend such action.

(3) Nothing in subsection (1) of this section is to be construed to prevent an unauthorized foreign or alien insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in subsections (2) or (3) of §625.30 hereof on the ground either (a) that such unauthorized insurer has not done any of the acts enumerated in subsection (1) of §625.30, or (b) that the person on whom service was made pursuant to subsection (3) of §625.30 was not doing any of the acts therein enumerated.

The Court of Appeals, Second Circuit, in construing the Tennessee statute, said that "the two *Parmelee* cases are not in point, as the Florida statute there involved showed on its face that it was only applicable to 'policies of insurance issued or delivered' in the State of Florida."

The Tennessee statute provides that "the doing of business in Tennessee * * * shall be deemed to mean and include *the doing in this state* * * * of any act whatsoever, whether interstate or intrastate in nature, including the soliciting, making or delivering of insurance contracts *in Tennessee* by agent, mail or otherwise," and then provides that "any such process * * * in any action or proceeding against it *growing out of such business* may be served upon the Commissioner of Banking and Insurance and * * * doing *such business* in Tennessee shall be a signification of its agreement that any notice of process so served shall be of the same legal force and validity as if served upon it in the State of Tennessee." In other words, "such business" is defined as the "doing in this state of *any act whatsoever* * * * including the soliciting, making or delivering of insurance contracts" (italics added), so that the statute when correctly interpreted provides that where the insurance company has *solicited, made or delivered insurance contracts in the State of Tennessee, substituted service of process may be had in an action or proceeding growing out of the act of soliciting, making or delivering of insurance contracts in that state.* The clause "of any act whatsoever whether interstate or intrastate in nature," which incidentally has its counterpart in the Florida statute, must be considered as *ejusdem generis* even though it precedes the limiting clause "including the soliciting, making or delivering of insurance contracts * * *." Otherwise, the language of the statute

is so broad and all-inclusive as to be repugnant to even the most liberal theories of due process. Thus interpreted, and it is submitted that this is the only logical interpretation possible, the Tennessee statute is no different from the Florida statute, which provides for substituted service in any action arising out of "any such contract of insurance" where the contracts of insurance referred to are contracts issued or delivered to residents of the State of Florida. It is therefore submitted that the Tennessee statute is just as inapplicable to petitioner in this case as the Florida statute was inapplicable to the Association in the *Parmelee* case. To hold otherwise would permit the State of Tennessee to become a mecca for every claimant under policies similar to those issued by this Association who wishes to recover substantial penalties under the provision of the Tennessee statute which the laws of his own state do not permit and who for that reason become a resident of the State of Tennessee *after* contractual obligations have been fixed and even after the cause of action has accrued. Quite clearly, this would be a result foreign to the traditional concepts of American jurisprudence.

It is at this point that the Court below failed to grasp a matter of vital import decided in the *Parmelee* cases. This is, that the statute is substantive in nature and not merely procedural. The Tennessee statute, as interpreted by the Court of Appeals, Second Circuit, is said to "have nothing to do with the substantive law which governs liability under the policy" (Opinion of Court, Appendix). It thus appears that the Court below is of the opinion that this statute, giving rise to a cause of action for penalties, which in this case amounted to $2,500, not recoverable in the state where the contract was made, is merely procedural. That the Tennessee statute is substantive in its entirety seems clear.

Prior to the enactment of the statute which seeks to permit substituted service, it is unquestionable that the plaintiffs herein could not obtain service upon the Association, which was not present either physically or otherwise within the State of Tennessee. If they had not the right to obtain service, then quite obviously they had not the right to sue. This being the case, the plaintiffs, prior to the enactment of the statute, would have been in no better position than one who has a cause of action barred by the statute of limitations, which has been held to be a substantive matter (*Guaranty Trust Co. v. York*, 326 U. S. 99). The Tennessee statute, however, attempted to create the right in the plaintiffs to obtain substituted service upon the Association, even though its activities were conducted entirely within the State of New York. This is no mere statutory pronouncement of the manner in which one is to proceed in enforcing a cause of action, but rather it creates a right which is basic to the cause of action itself and is therefore a substantive right. Not only does the statute purport to create the right to bring suit, but also it seeks to create the right to obtain penalties not obtainable either in the state in which the contract was made or under the terms of the contract itself.

The correct view was set forth by the Court in *Parmelee v. Iowa State Traveling Men's Ass'n*, 206 F. 2d 518, at page 523:

> "Furthermore as a regulatory law it plainly can be given no effect which will impose, retroactively, the provisions of the Statute upon unauthorized insurers having policies in force prior to the enactment of the statute. These distinctions are not hypothetical, but are substantial in the proper application of the statute. They mark the line between due process and unauthorized state action. * * *"

Thus, because of the inconsistency between the decision of the Court of Appeals for the Second Circuit in this case and the decision of the Court of Appeals for the Fifth Circuit in the *Parmelee* case, the decision of the Court below should be reviewed.

B. The Court of Appeals for the Second Circuit, in upholding the constitutionality of the Tennessee statute, has decided a Federal question in a way in conflict with applicable decisions of this Court.

1. Under the interpretation placed upon the Tennessee statute by the Court below, the defendant would be subject to the jurisdiction of the Tennessee Court in an *in personam* action, and liable for a personal adjudgment even though defendant has never been in the State of Tennessee, either directly or indirectly, by agent or otherwise, owns no real or personal property in that state, and has neither directly nor indirectly consented that the Tennessee Commissioner of Insurance and Banking should accept service of process in its behalf. Under such circumstances, the interpretation placed upon the Tennessee statute by the Court below is unconstitutional and directly in conflict with applicable decisions of this Court. *Pennoyer v. Neff*, 95 U. S. 714; *Old Wayne Mutual Life Assn. v. McDonough*, 204 U. S. 8; *Peoples Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79; *Rosenberg v. Curtis-Brown Company*, 260 U. S. 516; *Minnesota Commercial Men's Assn. v. Benn*, 261 U. S. 140; *Grannis v. Ordean*, 234 U. S. 385. It would serve no useful purpose to set forth the opinions from the numerous cases before this Court in which it has been held that due process of law requires a personal service of process in actions *in personam*. That petitioner was not present in the State of Tennessee and not doing business there to such an extent as to justify substituted service of process upon it was

well established in *Minnesota Commercial Men's Assn. v. Benn*, 261 U. S. 140. There, the activities of the defendant insurance company were essentially identical to those of the petitioner herein. This Court, in determining that the Courts of the State of Montana could not assert jurisdiction over the Minnesota corporation, stated at page 145:

> "Considering what this Court held in *Green v. Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 531; *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U. S. 264; *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79; and *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U. S. 516, we think it cannot be said that the Association was doing business in Montana merely because one or more members, without authority to obligate it, solicited new members. That is not enough 'to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted.' *People's Tobacco Co. v. American Tobacco Co., supra*, 87.
>
> "It also seems sufficiently clear from *Allgeyer v. Louisiana*, 165 U. S. 578; *Hunter v. Mutual Reserve Life Insurance Co., supra*, and *Provident Savings Life Assurance Society v. Kentucky, supra*, that an insurance corporation is not doing business within a State merely because it insures lives of persons living therein, mails notices addressed to beneficiaries at their homes and pays losses by checks from its home office. See also *Pembleton v. Illinois Commercial Men's Association*, 289 Ill. 99.
>
> "We conclude that the record fails to disclose any evidence sufficient to show that petitioner was doing business in Montana within the proper meaning of those words, and that the court there lacked jurisdiction to award the challenged judgment."

The *Benn* case clearly and unmistakably decides that the acts of the defendant in that case, and the acts of petitioner in the instant case, do not constitute doing business within the foreign state. Despite this clear and unequivocal pronouncement, the State of Tennessee has undertaken to flout the decision of this Court by declaring that the very acts which have been declared not to constitute doing business by a nonresident insurer do constitute doing business, and thereby confer jurisdiction upon its courts over a nonresident defendant in an action *in personam* where personal service has not been had upon the defendant. It is indeed a novel proposition to suggest that any state may, by legislation, overrule the decision of the Supreme Court of the United States. This, however, would be the effect of the decision of the Court of Appeals for the Second Circuit. In so doing, the Court of Appeals relied heavily upon *Travelers Health Assn. v. Virginia*, 339 U. S. 643, and *International Shoe Company v. Washington*, 326 U. S. 310. The holding in both of these cases has been extended far beyond any reasonable interpretation.

Travelers Health Assn. v. Virginia, supra, stands at most for the proposition that the State of Virginia, under its inherent police power, acting through its Corporation Commission, could issue a cease and desist order under the provisions of its Blue Sky Law against the defendant, with service of process upon the defendant by registered mail. It is one thing to say that a state, in the exercise of its police power, may under certain circumstances obtain jurisdiction over a nonresident insurer by substituted service of process, and quite a different thing to say that a policyholder, without the benefit of police power, has the same right. It is interesting to note that in the *Travelers* case, Mr. Justice Douglas, in a concurring opinion, expressly limited his decision to the ques-

tion of the validity of service in a proceeding under the Virginia Blue Sky Law, and Justices Minton, Jackson, Reed and Frankfurter dissented upon the ground that the activities of the Virginia Corporation Commission in regard to service of process were violative of the due process clause. The decision of the Supreme Court is therefore five to four against the proposition upon which the Court of Appeals for the 2nd Circuit relied.

Nor does *International Shoe Company v. Washington*, 326 U. S. 310, supply any valid basis for the decision of the Court below. In that case, the shoe company was actually present within the State of Washington by its duly authorized agent, who was actively engaged in furthering the business of the defendant. That the Court recognized the necessity for the presence within the state of agents whose business activities continue in behalf of nonresident corporate defendants is perfectly obvious from its statement at page 316, wherein it is said:

> "To say that the corporation is so far 'present' there as to satisfy due process requirements for the purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process."

That the Court did not intend by its decision in the *International Shoe Company* case to hold that activities such as those performed by petitioner in the instant case constituted a sufficient doing of business to support a judgment *in personam* where service was had by substitution is made abundantly clear by the statement of the Court at page 319:

> "Whether due process is satisfied must depend rather upon the quality and nature of activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that the state may make binding a judgment *in personam* against an individual or a corporate defendant *with which the state has no contacts, ties or relations.* Cf. *Pennoyer v. Neff, supra; Minnesota Commercial Men's Assn. v. Benn,* 261 U. S. 140." (Italics added.)

In view of the statement of the Court above quoted, it is obvious that the Court had no intention to impair "almost to the vanishing point" the authority of *Minnesota Commercial Men's Assn. v. Benn,* as suggested by the Court below. Rather, the Court in the *International Shoe Company* case expressly upholds the decision in the *Benn* case. Thus it is apparent that the decision of the Court of Appeals for the Second Circuit is in conflict with applicable decisions of this Court, in holding that the Tennessee statute complies with the requirements of due process, as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. Quite apart from the violation of the due process clause upon the grounds set forth above, the Tennessee statute further violates the provisions of the Fourteenth Amendment to the Constitution in that it attempts to give extraterritorial effect to its provisions. This is clearly in conflict with decisions of this Court. *Allgeyer v. Louisiana,* 165 U. S. 578; *New York Life Insurance Company v. Head,* 234 U. S. 149; *New York Life Insurance Company v. Dodge,* 246 U. S. 357; *St. Louis Compress Co. v. Arkansas,* 260 U. S. 346; *Minnesota Men's Association v. Benn,* 261 U. S. 140; *Home Insurance Company v. Dick,* 281 U. S. 397; *Hartford Indemnity v. Delta,* 292 U. S. 143. The contract involved herein was made in

the State of New York, and was valid where made. Being a New York contract, it was subject to the law of the State of New York and New York only. It is conceded that the insured was not a resident of the State of Tennessee at the time that the contract was made. To permit the imposition of the penalty provided for under the Tennessee statute constitutes an impairment of the contract in violation of Article I, Section 10, of the Constitution of the United States; a violation of Article IV, Section 1, of the Constitution requiring that full faith and credit be given in each state to the public acts of every other state; and a deprivation of property without due process of law contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution (*Aetna Life Insurance Company v. Dunken*, 266 U. S. 389).

It would be difficult to imagine a decision more in conflict with the *Dunken* case than that rendered in the court below. In the *Dunken* case, this Court, in holding that the State of Texas might not impose a penalty similar to the penalty imposed by the Tennessee statute in the instant case, where the contract of insurance involved was entered into in the State of Tennessee, said at page 399:

> "* * * The contract contained in the original policy was a Tennessee contract. The law of Tennessee entered into it and became a part of it. The Texas statute was incapable of being constitutionally applied to it, since the effect of such application would be to regulate business outside the State of Texas and control contracts made by citizens of other states in disregard of their laws under which penalties and attorneys' fees are not recoverable. *New York Life Insurance Company v. Head*, 234 U. S. 149; *Overby v. Gordon*, 177 U. S. 214, 222."

And at page 400:

> "From these premises it necessarily results that the second policy follows the status of the first for which it was exchanged, and is not subject to the Texas statute relating to penalties and attorneys' fees, but is controlled by Tennessee law. The judgment below, therefore, insofar as it gives effect to the Texas statute by imposing a penalty of twelve per cent and allowing attorneys' fees, is erroneous, in that the Texas statute cannot constitutionally be applied to a Tennessee contract."

The case at bar presents an even stronger picture than that in the *Dunken* case, because petitioner is not now, nor has it ever been, present within the State of Tennessee, whereas in the *Dunken* case the Aetna Life Insurance Company was authorized to do business in the State of Texas under the laws of that state, and the insured was a resident of the State of Texas at the time that the policy upon which suit was brought was substituted for the original policy issued to him in Tennessee.

Ostensibly the statute involved herein is enacted under the guise of an exercise of its police power by the State of Tennessee. To the extent that the State of Tennessee properly exercises its police powers within the territorial limits of Tennessee, we have no present concern. This statute, however, goes far beyond the valid exercise of any police power. It presumes to subject a New York corporation to the jurisdiction of the State of Tennessee upon the basis of corporate acts performed in the State of New York and entirely legal in the State of New York. The statute provides that the doing of certain acts in the State of New York shall constitute an automatic appointment of the Commissioner of Insurance and Banking as an agent upon whom service of process may be had. This is clearly an attempted extension of the police power of the State of Tennessee into the State of New

York, and as such is unconstitutional. Nor is *Travelers Health Association v. Virginia*, 339 U. S. 643, authority for a contrary opinion, as supposed by the Court below. In the *Travelers* case, the state itself, acting pursuant to its police power, issued a "cease and desist" order restraining the defendant from doing certain acts *within the State of Virginia.* Service of process was obtained by substituted service, and the "cease and desist" order against the defendant was held to be valid. The difference between the *Travelers Health* case and the instant case, however, is that the State of Virginia might have issued its "cease and desist" order against the defendant therein without obtaining service of process upon the defendant at all. Quite a different situation prevails when an attempt is made by a private individual to obtain a judgment *in personam* against a corporation not present within the state in which suit is brought. This is a vital distinction which was overlooked by the Court below. If the opinion of the Court below is correct it would follow that the State of Tennessee might enact a statutory tax upon a foreign non-admitted corporation upon New York business defined by the Tennessee statute to be Tennessee business and then obtain a judgment for the amount of such tax, which would be enforceable in New York against the New York corporation even though it had never set foot within the State of Tennessee. Quite clearly, such an interpretation is erroneous.

In view of the conflict between the decision of the Court of Appeals for the Second Circuit and applicable decisions of this Court, the decision of the Court below should be reviewed.

C. The Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court.

The question involved is whether, in view of the provisions of Clause 7, §8, Article I of the Constitution of the United States, the Tennessee statute which, in effect, states that the mailing of any matter in any way connected with petitioner's business in the State of New York shall constitute a designation of the Tennessee Commissioner of Insurance and Banking as petitioner's agent upon whom service of process may be made, does not constitute an attempt at regulation by the State of Tennessee of the United States mails, contrary to the exclusive power of Congress to regulate the use of the United States mail. The Court of Appeals for the Second Circuit has summarily dismissed petitioner's contention that the statute does constitute an invalid attempt to regulate the use of the mails as being without merit, citing in support of its position *Travelers Health Association v. Virginia*, 339 U. S. 643. It is only necessary to read the opinion of *Travelers Health Association v. Virginia* to realize that whatever else that case may decide, it expressly leaves undecided the question here presented, the Court saying at page 651:

> "Due process questions we have already discussed are the only alleged errors relied on in appellant's brief, and appellant's special appearance only challenged state jurisdiction and the service of process."

and in a footnote, the Court, at page 651, pointed out:

> "One federal question suggested in the appellant's statement of jurisdiction was that §6, as interpreted by the state court, infringed federal control of the mail delegated to Congress by Article I, §8, Clause 7 of the United States Constitution. But appellant's brief on submission of the case

> does not include this question in the 'specifications of errors relied upon,' and does not even mention that constitutional clause."

The question, then, of whether or not the Tennessee and other similar statutes constitute an invalid attempt to regulate the use of the United States mails remains an important question of federal law not decided by this Court.

The Tennessee statute refers to "the doing in this state by such company of any act whatsoever, *whether interstate or intrastate* in nature, *including the soliciting*, making *or delivering of insurance contracts in Tennessee by* agent, *mail, or otherwise.*" (Italics ours.) Plaintiffs apparently interpret this language to mean not that the act in question should originate "in this state," but rather that it may originate outside of this state, the contract being made *"by mail or otherwise."* If that interpretation, rather than what seems to us to be the plain import of the language, is adopted, then in that event plaintiffs assert that no individual or foreign corporation even within the state of domicile can mail a letter of solicitation or can deposit an insurance contract or a premium notice addressed to Tennessee in the United States mail without thereby appointing the Commissioner of Insurance and Banking of the State of Tennessee as an agent to accept the service of process. We submit that no state has the right so to burden, control, regulate or prohibit the use of the United States mail. A citizen of the United States is entitled to use the United States mail for any lawful purpose that he may desire, so long as that use complies with the regulations of the United States Post Office Department and the federal statutes. No state has any right to place any condition whatsoever upon the use by private citizens of the United States mail. Consequently, the State of Tennessee may not properly forbid a foreign resident to use the United States mail unless

he thereby consents that such use shall constitute an appointment of the Tennessee Insurance Commissioner as his agent for the service of process. That such purported activity is beyond the power of any state has been held in *Badders v. United States,* 240 U. S. 391, in which the Court at page 393 stated:

> "The overt act of putting a letter into the post office of the United States is a matter that Congress may regulate. *Ex parte Jackson,* 96 U. S. 727."

It is elementary that if Congress has the sole right to regulate the use of the United States mail, no state may have similar jurisdiction. The Tennessee statute, as interpreted by claimants, purports to withdraw from the Federal Government its control and regulation of the United States mail and of the Post Office Department. This is a matter which is expressly and exclusively delegated to Congress by §8, Article I of the Constitution, granting to Congress the power to "establish post offices and post roads."

In *Pensacola Telegraph Company v. Western Union Telegraph Company,* 96 U. S. 1, the Court considered the exclusive power to regulate the mail and the effect of state regulation which infringed upon this power, concluding at page 9:

> "• • • Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government.
>
> "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. • • • As they were entrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the

states and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation."

And again, at page 10:

> "The Government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by state lines. *Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all.*" (Italics added.)

This same conclusion was subsequently reached in the later case of *In re Rapier,* 143 U. S. 110 (1892) at 134:

> "The States before the Union was formed could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. *When the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power,* and the grant carried with it the right to exercise all the powers which made that power effective." (Italics ours.)

That the states, themselves, have recognized the exclusive power of Congress to regulate and control the use of the mails is illustrated in *Rose Co. v. State,* 133 Ga. 353, 65 S.E. 770 (1909), where the Court stated:

> "The establishment of post-offices, and regulation of the mails is a matter which has been dealt with by the Federal authorities under their contitutional powers. Subject to *Federal laws and regulations they are open to all who desire to conduct through them legitimate business transactions*" (pp. 773, 774). (Italics ours.)

The Attorney General of the United States has also rendered an official opinion on this subject in 25 Op. Atty. Gen. 354:

> "No part of the Government service more closely affects the people than the Postal Service. * * * *Congress recognizing this has jealously guarded and conserved this great privilege for the people. It has by appropriate legislation assumed exclusive control over and responsibility for the mails"* (p. 356). (Italics ours.)
>
> "From the foundation of the Government it has been its policy to exercise exclusive control over the operations of the Postal Service * * *" (p. 368).

See also:

> Story's Commentaries on the Constitution of the United States (4th ed. 1873), §1124 *et seq.*

The power granted to Congress by the Constitution to establish, regulate and control the mails of this country became immediately exclusive when the power was used and exercised and from thence forward foreclosed any attempted regulation, either direct or indirect, by state legislation. As the Supreme Court of the United States said in the case of *In re Debs*, 158 U. S. 564 (1895):

> "Obviously these powers given to the national government over interstate commerce and in respect to the transportation of the mails were not dormant and unused. *Congress had taken hold of these two matters, and by various and specific acts had assumed and exercised the* powers given to it, and was in the full discharge of its duty to regulate interstate commerce and carry the mails. *The validity of such exercise and the exclusiveness of its control had been again and again presented to this court for consideration"* (pp. 580, 581). (Italics ours.)

That Congress has taken action in the field of regulating what may and may not be transmitted in the mail can be seen from 18 U.S.C.A. 1463, which prohibits the mailing of obscene matter and 18 U.S.C.A. 1302, which prohibits use of mails to conduct lotteries.

Applying the foregoing principles to the present issue, it is obvious that if plaintiffs have adopted the correct interpretation of the Tennessee statute, the State of Tennessee has exceeded its power and authority in that it has attempted to regulate, control and limit a use of the mails to which Congress has up to now given its approval by requiring no such limitation.

The Supreme Court of the State of Georgia has ably expressed the limits imposed upon a state in *Rose Co. v. State, supra,* at page 774:

> "A State can exercise its police power to the limit of its own domain, but *it cannot go beyond and police the citizens of other States,* acting beyond its borders in the conduct of a lawful business *or prevent their using the mails by posting letters or circulars in such other States in carrying on legitimate business.*" (Italics ours.)

It follows that any attempt by statute or otherwise on the part of any state to regulate, limit or prohibit the use of the United States mails is wholly void, and that consequently, the Tennessee statute in question cannot properly be used as a basis for conferring jurisdiction upon the Insurance Commissioner of Tennessee to act as an agent for the service of process on the defendant association.

Indeed, it is doubted that even Congress, though vested with exclusive control over the use of the United States mail, would have the power to pass legislation such as that involved herein. That Congress itself does not have unlimited authority has been well expressed in *Securities*

and Exchange Commission v. Torr, 15 Fed. Supp. 315, at page 319, as follows:

> "• • • To be sure, there is a limit to the control of both the mails and interstate commerce. Congress may not use either of these powers in an arbitrary manner, as to take away a right guaranteed to citizens by other provisions of the Constitution or to seize control of a matter purely local in character. *Adair v. United States,* 208 U. S. 161 • • •; *Hammer v. Dagenhart,* 247 U. S. 251 • • •; *Railroad Retirement Board v. Alton R. Co.,* 295 U. S. 330 • • •."

Thus it is that while Congress may regulate the material which is mailed, it may not regulate persons using the mail in such a manner as to deprive them of their rights under the Constitution. The limitations upon Congress' right to control the use of the mail were recognized by this Court at an early date in *Ex Parte Jackson,* 96 U. S. 727, where, at page 732, the Court said:

> "• • • The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of mail. • • •"

And, as Mr. Justice Brandeis pointed out in *Milwaukee Publishing Co. v. Burleson,* 255 U. S. 407, at pages 430-431:

> "In other words, the postal power, like all its other powers, is subject to the limitations of the Bill of Rights (*Burton v. United States,* 202 U. S. 344, 371). Compare *Adair v. United States,* 208 U. S. 16. *Congress may not, through its postal power,*

> *put limitations upon the freedom of the press which, if directly attempted, would be unconstitutional.* This Court also stated, in *Ex Parte Jackson*, that 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.'" (Italics ours.)

Directly in point is *In re American States Public Service*, 12 Fed. Supp. 667, in which the Court points out that even Congress may not use its postal authority as a means of accomplishing by indirection that which it has been prohibited from doing by other clauses of the Constitution. Here, the Court at page 702 reviewed the instances of various types of exercise by Congress, with limitations upon use of the mail, pointing out specifically at page 702 that these instances all comprehended exclusion of improper matter as distinguished from the exclusion of the rights of certain persons to make use of the mail, saying:

> "In all of these instances, however, the exclusion related directly to the matter itself sought to be transmitted by the mails, and is, the offending thing. The Public Utility Holding Company Act, however, denies the right to use the mails of all companies or individuals that fall within its classifications when they fail to comply with any of the multifarious requirements of the Act, not, as we have seen, with respect merely to matter the transmission of which through the mail shall first have been found to be contrary to the public interest, but it excludes communications of every kind whatsoever indulged in by these companies or individuals, without regard to the character of such communications other than that they shall relate to the business of these companies or individuals, on the theory that they are 'affected with a national public interest' * * *"

And again at page 704, the Court says:

> "• • • The decisions very definitely support the conclusion here reached, to wit, that the exclusion must rest directly upon a regulation *of the mails*, that is, of the use—of the *thing* mailed—and not upon a regulation of the *user* • • •"

Clearly, what Congress may not do in a field over which it has exclusive power, the state may not do. The attempt therefore to prevent a New York resident from using the U. S. mails even in the State of New York except upon condition that by so doing he shall *ipso facto* render himself subject to the jurisdiction of the State Courts of Tennessee is clearly unconstitutional, being in violation both of Clause 7, §8, Article I of the Constitution and of the Fourteenth Amendment.

CONCLUSION.

In conclusion, it is submitted that the statute of the State of Tennessee and similar statutes of other states, if declared to be constitutional, will have a damaging and far-reaching effect not only upon insurance companies against whom the statutes have been directed, but also upon all foreign corporations of every nature to whom the principle thus established might be applied. To thus abrogate all of the traditional concepts of due process of law, in order to subject a relatively small segment of American industry to the jurisdiction of the Courts of states not otherwise having jurisdiction, is a step which should not be taken lightly, nor out of sympathy for the supposed hardships which are said to result out of the inability of a policyholder to commence suit against a non-resident insurance company in the state of the policyholder's domicile. The Tennessee statute by its terms affects only insurance companies. If the proposition sought to be established here, however, is applicable to

insurance companies, it is likewise applicable to any company anywhere in the United States or elsewhere, who makes use of the United States mails for any purpose whatsoever. While it may constitute a hardship upon the resident of Tennessee to be unable to sue in Tennessee an insurance company not licensed to do business within Tennessee, conversely it constitutes a hardship upon an insurance company to be forced to submit to the jurisdiction of each of the forty-eight states and to be continually harassed by actions, often involving penalties, which may or may not be brought in good faith, in every court in the United States or its territories. It is respectfully submitted that because of the immediate and vital importance of the statute involved, and because of the errors of the Court below hereinbefore set forth, this Court, in the exercise of its sound discretion, should grant the writ of certiorari requested by petitioner.

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APPENDIX A.

Memorandum Decision of Brennan, J.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

J. C. SCHUTT, Administrator of the Estate of John P. Bell, deceased, JANE BELL, FRANCES BELL EBLING and MARGARET BELL DOUGLAS, residents of Davidson County, Tennessee,

Plaintiffs-Appellants,

v.

THE COMMERCIAL TRAVELERS MUTUAL ACCIDENT ASSOCIATION OF AMERICA, a corporation organized under the laws of the State of New York, with its home office in Utica, New York,

Defendant-Appellee.

Appearances:

Kernan and Kernan, Attorneys for Plaintiff, J. C. Schutt, First National Bank Building, Utica, New York, Mr. Willis Morgan, Mr. Bruce McLean, of Counsel.

Brown, Hubbard, Felt and Fuller, Attorneys for Defendant, First National Bank Building, Utica, New York, Mr. Moses G. Hubbard, of Counsel.

Motion to Dismiss the Second Cause of Action Set Out in the Complaint.

Argued November 3, 1952; Decided August 12, 1954.

BRENNAN, Judge.

The complaint herein contains two separate causes of action. The first is the usual cause of action, based upon a policy of insurance issued by the defendant upon the life of John P. Bell. It is alleged that the insured lost his life in a fire which destroyed his residence in Davidson County, Tennessee, on October 8, 1950, under circumstances which entitled the beneficiaries to the benefits of said policy.

The second cause of action is in substance an action upon a judgment entered in favor of the plaintiffs and against the defendant in Part II of the Chancery Court in Davidson County, Nashville, Tennessee, on the 25th day of May, 1951. The motion to dismiss is directed only to the second cause of action.

The defendant contends that the judgment above referred to is void, in that the Court rendering same acquired no jurisdiction over the defendant for the reason that the service of process in that action was ineffective to confer such jurisdiction. A concise statement of the facts affording a background for the decision is set forth below.

The defendant is a membership association, organized under the Insurance Law of the State of New York, and authorized to issue personal health and accident insurance contracts to its members. Its home office is located at the City of Utica, New York. It has no office, officers, or agent in the State of Tennessee, and owns no property of any nature within that state. Its business is transacted by mail from its home office. An applicant for insurance submits his application by mail, where it is received and acted upon. If the action is favorable, a contract is issued and mailed to the applicant. Notices of assessments or premiums due are mailed from the home office to the member, who makes remittance

by mail. Claims are presented by mail, and payments made in the same maner.

The insured, John P. Bell, became a member of the Association on December 29, 1937, and was at that time a resident of Winchester, Kentucky. He thereafter submitted three different claims under the membership certificate or insurance contract; all of which were handled in the manner indicated above. In July, 1942, he applied for a new certificate, and defendant mailed same to him at his Kentucky address. Sometime later, but prior to 1947, the insured moved to Tenessee, and it would appear that he was a resident of Davidson County, Tennessee, until the time of his death. Premium notices and remittances therefor were sent and made by mail in the maner above set forth, so that the policy was in full force and effect at the time of his death. Proofs of death were submitted and payment declined.

No question is raised as to the rights of the plaintiffs to maintain this action, and no ruling is made thereon. Plaintiff Schutt is the administrator of the deceased, Bell, appointed by the County Court, Davidson County, Tennessee. The remaining plaintiffs are the daughters of the insured, and are the living beneficiaries named in the contract as entitled to the benefits thereof.

After the death of the insured, and the denial of liability under the contract by the defendant, these plaintiffs commenced an action against the defendant in Part II of the Chancery Court, Davidson County, at Nashville, Tenessee, to recover a money judgment representing the benefits provided in the contract. Service of process in that action was made upon the defendant in accordance with the provisions of Chapter 119 of the Public Act of Tennessee of 1947. The service was effected by serving the process upon the Insurance Commissioner of the State of Tennessee, and transmitted by

him, in accordance with the law, to the defendant at Utica, New York. Same was returned to the Insurance Commissioner by the defendant enclosed in a letter which, in effect, advised that the defendant did not transact business in the State of Tennessee, and had never designated the Commissioner or any other official to accept service in its behalf. The defendant failed to appear in any manner in said action, and a default judgment was thereupon entered.

A certified copy of the decree is attached to the complaint, and while it does not appear to be signed, it apparently is in accordance with Tennessee practice. The decree in effect grants judgment against the defendant in the face amount of the policy, to wit, $10,000, with interest from December 8, 1950. It further recites that the failure of the defendant to make payment was in bad faith, resulting in additional costs and expense in the amount of $2,500; so that the total judgment amounts to $12,828.32. The cause of action to which this motion is addressed seeks the recovery of the above amount in accordance with the Tennessee judgment.

The question on this motion is: Did the Tennessee Court obtain jurisdiction over this defendant so as to afford validity to the above judgment?

The particular provisions of law involved here are referred to as apparently contained in Chapter 119 of the Public Acts of Tennessee of 1947. The pertinent parts thereof are set out below.(1) Plaintiffs expressly rely

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Footnote (1)

Sec. 6459.48

Definitions: For the purposes of this Act the following definitions shall apply:

(2) "Foreign Insurance Company" shall mean an insurance company, as herein defined, organized under the laws of any state of the United States, other than this state, or under the law of any territory or insular possession of the United States or the District of Columbia.

upon same as affording a jurisdictional basis for the judgment.

We do not have the benefit of the construction and application of the statutes referred to by the Courts of Tennessee. This Court appreciates that federal courts should avoid the construction of state statutes, and refrain from passing upon their constitutionality, unless required in order to reach a decision. The decision here then can be limited to determining whether or not such statutes afforded jurisdiction of the defendant under the above facts.

It is unnecessary to discuss the general requirements which must exist in order that a foreign corporation may be found to be doing business in a particular jurisdiction. Jurisdiction in this case must stand or fall upon the provision which permits the service of process upon the Commissioner of Insurance, "* * * in any action or proceeding against them growing out of such business

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(Cont.)

Sec. 6459.49 What Constitutes Doing Business

For the purposes of this act, the doing of business in Tennessee by any foreign or alien insurance company, as herein defined, shall be deemed to mean and include the doing in this state by any such company of any act whatsoever, whether interstate or intrastate in nature, including the soliciting, making, or delivering of insurance contracts in Tennessee, by agent, mail or otherwise.

Sec. 6459.51 Doing Business deemed such appointment—

If any such company shall do business in this state as herein defined, without having appointed the Commissioner of Insurance and Banking its true and lawful attorney, as required herein, it shall by doing such business in the State of Tennessee, be deemed to have thereby appointed the Commissioner of Banking and Insurance its true and lawful attorney for the purposes hereinafter set forth.

Sec. 6459.53. Process or notice served on Commissioner: When service may be made on Secretary of State.

When the Commissioner of Insurance and Banking has been appointed or constituted attorney for any such company, either by power of attorney or by failure to comply with the provisions of this act, any such process against or notice to such company in any action or proceeding against it growing out of such business may be served on the Commissioner of Insurance and Banking, and filing such power of attorney or doing such business in Tennessee shall be a signification of its agreement that any such process or notice so served shall be of the same legal force and validity as if served upon it in the State of Tennessee.

" * * *." The question then is: Did this litigation grow out of the business transacted by the defendant and the insured in the State of Tennessee? It is obvious that in using the language above quoted the Legislature of the State of Tennessee referred to the business transacted within that state. Here the contract was made in New York, between a New York corporation and a Kentucky resident. The obligations of the parties were fixed outside of the State of Tennessee, and prior to the effective date of the statutes under consideration. This action arose out of such obligations. The mailing of premium notices to a resident of Tennessee, the remittance of premium payments by mail from Tennessee, and the submission of proofs of death of the insured by mail from that state, are not such acts as would bring the defendant within the purview of the statute. To hold otherwise would broaden jurisdiction to the point where the address to which premium notices are mailed, and the place from which remittances are mailed, would become controlling factors in determining jurisdiction.

There is no question but that the States are given broad powers to regulate the matter of carrying on the insurance business within their borders, and to alleviate the condition which may require the maintenance of an action within a jurisdiction far removed from that of the claimant. This Court, however, finds no case which goes so far as to sustain jurisdiction under the facts and law as they appear here.

The reasoning of the Court in the case of *Parmelee v. Iowa State Traveling Men's Association*, 206 F. 2nd 518, and the application of same in the case of *Parmelee v. Commercial Travelers*, 206 F. 2nd 523, is highly persuasive on this motion. The statutes under discussion therein are of the same general import as the Tennessee

statutes involved here. Both statutes in substance purport to appoint the Insurance Commissioner as the person to receive the service of process for a foreign insurance company, when such company performs any act allied to the transaction of the business of insurance. The Court rejects the application of such a statute to a certificate of insurance delivered outside the state, and prior to the passage of the statute involved. This Court can see no distinction between the problem here and that decided in the above cases. To discuss it further would only be to repeat statements made in the above cited authorities.

In view of the decision, it is unnecessary to determine or discuss the effectiveness of the provision under which the additional liability was imposed upon the defendant by the Tennessee Courts. This decision is limited to the construction and application of the Tennessee statutes only in so far as is set forth above.

The motion herein is apparently made for judgment on the pleadings (Federal Rule of Civil Procedure 12[c]), and, since matters outside the pleadings are presented, it will be treated as a motion for summary judgment. It is, therefore,

Ordered, that the motion be granted, and that the defendant is entitled to, and is granted, a judgment dismissing the second cause of action set forth in the complaint.

STEPHEN W. BRENNAN,
U. S. D. J.

Opinion of Medina, J.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 147—October Term, 1955.

(Argued December 20, 1955 Decided January 17, 1956.)

Docket No. 23371

[SAME TITLE.]

Before: CLARK, Chief Judge, and MEDINA and WATERMAN, Circuit Judges.

Appeal from a judgment of the United States District Court for the Northern District of New York. Stephen W. Brennan, Judge.

Plaintiff appeals from a judgment dismissing plaintiff's second cause of action based on a Tennessee state court judgment *pro confesso*. Reversed and remanded.

Kernan and Kernan, Utica 2, New York (Willis D. Morgan and Bruce C. McLean, of Counsel), for Plaintiffs-Appellants.

Hubbard, Felt & Fuller, Utica, New York, for Defendant-Appellee.

MEDINA, Circuit Judge:

Plaintiffs are the beneficiaries named in an accident policy of insurance and the legal representative

of the assurred, John P. Bell, who lost his life in a fire which destroyed his home in Davidson County, Tennessee, on October 8, 1950. They appeal from a judgment dismissing their second cause of action, based upon a Tennessee state court judgment, which the Court below held not entitled to full faith and credit for lack of jurisdiction.

Where a defendant plainly receives adequate notice and is afforded a reasonable opportunity to defend, the requirement of physical presence in the state has been whittled down until it is now frankly recognized that a state may enact statutes which provide for substituted service against non-residents and foreign corporations, which will support judgments *in personam,* which are entitled to full faith and credit, providing there exist "certain minimum contacts" within the territory of the forum, and these must be of such a character "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Company v. Washington,* 326 U. S. 310, 316.

The background is the mushroom growth of the mail order insurance business. Typically such companies maintain an office and own property only in the state where they are incorporated, but they insure risks in many states, sometimes on a nation-wide basis. They have no agents or solicitors. New business is secured through the efforts of old policy holders, or "members," spurred on by offers of prizes and aided by advertisements and application blanks furnished by the company. The amounts of money involved are small, full coverage of $5,000 or $10,000, the various sums of accident, hospital and health coverage running from a few dollars up to a few thousand. Some of these details appear in the exhibits attached to the affidavits in this case. In any event, such has been the success of these

companies and so clear is the hardship of requiring the assured or his beneficiaries to hire a lawyer to prosecute such small claims in a state far from the residence of the policy holder, where the necessary witnesses are generally to be found, that several states have enacted legislation to protect their residents against the expense, inconvenience and injustice which are found to exist where such claims are required to be prosecuted in far distant forums.[1]

We are concerned here with a statute of Tennessee Code, Sections 6459.48, 6459.49, 6459.51 and 6459.53 (Chapter 119 of the Public Acts of Tennessee of 1947), hereinafter discussed.

The defendant, a New York membership corporation, had no property, office or employees in Tennessee. The policy was issued to the deceased in 1942, when he resided in Winchester, Kentucky. According to the terms of the contract, it is agreed that it "is for all purposes deemed to be executed, issued and delivered within • • • the State of New York." Prior to 1947 the decedent moved to Tennessee, where he was domiciled at the time of his death. The activities of defendant in Tennessee were: the usual solicitation of new business by "members," with prizes, advertising matter and application blanks; notices of assessments or premiums due, sent regularly through the mails to decedent and to other policy holders and received by him and by others at their Tennessee homes; acceptance of remittances for assessments or premiums mailed in Tennessee; and the mailing of proofs of loss in Tennessee and the presence of an investigator of defendant on the premises after the fire.

[1] See Note, 39 Va. L. Rev. 966 (1953), where the statutes are collected and the problem of mail order insurance discussed.

Service of process in the Tennessee state case was made on the Commissioner of Insurance, who forwarded the papers promptly to defendant in Utica, New York. But defendant took the position that it had never transacted any business in Tennessee, had no representatives there and had never designated the Commissioner of Insurance to accept service in its behalf. A decree *pro confesso* followed in due course, and it included, in accordance with Tennessee law,[2] "additional costs and expenses in the sum of $2500.00 arising directly out of defendant's refusal in bad faith to pay its obligation under said policy."

The court below, citing *Parmelee v. Iowa State Traveling Men's Association*, 5 Cir., 206 F. 2d 518, and *Parmelee v. Commercial Travelers*, 5 Cir., 206 F. 2d 523, held that it was not necessary to consider the constitutional questions of due process and full faith and credit, as it construed the Tennessee statute as having no application "to a certificate of insurance delivered outside the State, and prior to the passage of the statute."

Did the court below construe the statute correctly? We think not. The two *Parmelee* cases are not in point as the Florida statute there involved showed on its face that it was only applicable to "policies of insurance issued or delivered" in the State of Florida. Naturally, had the Tennessee statute with which we are now concerned stated that the procedure set forth should be available only where the policy had been issued or delivered in the State of Tennessee, substituted service would not have been available in an action to recover on a policy delivered in Kentucky.

Nor is there anything in the text of Chapter 119 of the Laws of 1947 to indicate that the benefits to be derived from its provisions with respect to substituted service are reserved for those to whom policies were delivered in Tennessee after the enactment of the statute. These

[2] Code of Tennessee §6434.

salutary laws have nothing to do with the substantive law which governs liability under the policies. Indeed, it is not disputed that plaintiff's cause of action arose in Tennessee. The natural inference is that this new mode of substituted service of process is to be available immediately upon the enactment of the new law, for the benefit of anyone who wishes to bring suit in a local state court against a foreign insurance company doing business in the state within the definition of the statute.

In view of the background against which this and similar state statutes were passed, as above stated, it would seem apparent that a broad and liberal interpretation, consistent with the terms of the statute, should be adopted in order that Tennessee residents, holding such policies, may not be forced to pursue their remedies in far distant states.

Construing together all the sections of the statute, as we must, it is clear to us that the intention of the legislature was to authorize substituted service on whatever foundation of activities within the state might be deemed by the Supreme Court to be the minimum consistent with standards of due process.

Thus, after describing a Foreign Insurance Company, Section 6459.49 defines "What Constitutes Doing Business" as "the doing in this state by any such company of any act whatsoever, whether interstate or intrastate in nature, including the soliciting, making, or delivering of insurance contracts in Tennessee, by agent, mail or otherwise."

Certainly the mailing of the premium notices and the remittance of premium payments and the submission of proofs of death constitute "the doing of any act whatsoever, whether interstate or intrastate in nature." The company is at one end or the other of each of these activities, which go in both directions, and one end is in New York and the other end in Tennessee. Moreover, prior to the commencement of the action, defendant's investigator and his duly authorized assistants were functioning in Tennessee.

Section 6459.51 provides that "by doing such business," as just above defined, the company is deemed to have appointed the Commissioner of Insurance its agent "for the purposes hereinafter set forth." And in Section 6459.53 these "purposes" are explained as relating to service of process "in any action or proceeding against it growing out of such business."

"Such business" includes of course the doing of "any act whatsoever," and this is the demand for and the receipt of premiums, which serve to keep the policy in full force and effect, and such other activities as relate to proofs of loss, investigation of the claim and so on, as preliminaries to the fixing of liability. It is no fiction to say that the lawsuit "grows out" of these activities, for without them there would be no basis whatever for bringing the suit. Indeed, we are frank to say that an interpretation which excludes from the operation of the statute all policyholders who received their certificates in Tennessee or elsewhere prior to 1947, and all those who received them after 1947, but before taking up a domicile in Tennessee, would seem to have no relationship to the phrase "growing out of such business" nor to the purposes for which the legislation was passed.

The constitutional question is more difficult of solution. At least we may pass over the early cases, many of which are cited and relied upon by defendant, but which have long since been displaced.

It seems to us that the authority of *Minnesota Commercial Men's Assoc. v. Benn*, 261 U. S. 140, strongly relied upon by defendant, has been impaired almost to the vanishing point by *Travelers Health Assoc. v. Virginia*, 339 U. S. 643, where Mr. Justice Black's opinion finds significant support in Mr. Chief Justice Stone's reasoning in *International Shoe Co. v. Washington*, 326 U. S. 310, from which we have already quoted.

Perhaps in the end vestiges of the old "physical presence" theory will prevail. However that may be, we agree

with and will follow the opinions of the court in the *International Shoe Co.* and *Travelers Health Assoc.* cases, to which reference has already been made. See also *Perkins v. Benguet Cons. Mining Co.*, 342 U. S. 437; *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245.

Few if any activities within a state touch the people so closely as do those of insurance companies. Here the defendant has hit upon a way of transacting its business which reduces its contacts with its policyholders and its methods of obtaining new business to communications by mail. But the result is precisely what it would have been if salesmen rather than "members" procured new customers and if agents went from house to house collecting premiums instead of the sending of notices and receiving remittances through the mail. And this is done year after year on a large scale, in a systematic and regular way. Doubtless large numbers of policies are issued in due course to residents of Tennessee each year, and these are administered and processed in due course, in addition to those already held by others. If there is any doubt about the extent of defendant's mail order insurance business in Tennessee, plaintiffs should be afforded opportunity to amplify the proofs appearing in plaintiffs' affidavits, which were submitted in opposition to a motion to dismiss, which was treated by the court as a motion for summary judgment, and granted.

We think a fair balancing of the inconveniences discloses a situation which is unduly burdensome and in a high degree unjust to the holders of defendant's policies and that consequently the legislation in question does not run counter to the due process clause of the Constitution.

Nor do we find any merit in defendant's other contention, that the legislation is unconstitutional as an improper attempt to regulate the use of the United States mail. *Travelers Health Assoc. v. Virginia, supra.*

Reversed and remanded.

Judgment.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of January, one thousand nine hundred and fifty-six.

Present:

HON. CHARLES E. CLARK,
Chief Judge.
HON. HAROLD R. MEDINA,
HON. J. EDWARD LUMBARD,
Circuit Judges.

[SAME TITLE.]

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and action remanded in accordance with the opinion of this Court, with costs taxed in favor of the appellants.

/s/ A. DANIEL FUSARO
Clerk

APPENDIX B.

UNITED STATES CONSTITUTION

Article I

Section 8. The Congress shall have power • • •

To establish Post Offices and post Roads; • • •

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

• • • • • • •

Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TENNESSEE STATUTES

Chapter 141 of the Laws of Tennessee of 1901 provides:

Section 1. Additional Liability upon Insurers for Failure to Pay Promptly Insurance Losses When Refusal is Not in Good Faith.

The insurance companies of this state, and foreign insurance companies and other persons doing an insurance business in this state, in all cases when a loss occurs and they refuse to pay the same within sixty days after a demand shall have been made by the holder of the policy on which said loss occurred, shall be liable to pay the holder of said policy, in addition to the loss and interest thereon, a sum not exceeding twenty-five per cent on the liability for said loss; provided that it shall be made to appear to the court or jury trying the case that the refusal to pay said loss was not in good faith, and that such failure to pay inflicted additional expense, loss, or injury upon the holder of said policy; and, provided, further, that such additional liability, within the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss and injury.

Williams Tennessee Code §6434

Chapter 119 of the Laws of Tennessee of 1947 provides:

Section 1:

(1) "Insurance Company" shall mean an insurance or surety company, including mutual companies, and shall

be deemed to include a corporation, company, partnership, association, social, fraternal or otherwise, order individual or aggregation of individuals engaging in or proposing or attempting to engage in any kind of insurance or surety business, including the exchange of reciprocal or inter-insurance contracts between individuals, partnerships and corporations.

(2) "Foreign Insurance Company" shall mean an insurance company, as herein defined, organized under the laws of any state of the United States, other than this state, or under the law of any territory or insular possession of the United States or the District of Columbia.

(3) "Alien insurance Company" shall mean an insurance company, as herein defined, organized under the laws of any country other than the United States or territory or insular possession thereof or of the District of Columbia.

Williams Tennessee Code #6459.48.

Section 2:

What constitutes doing business—For the purposes of this act, the doing of business in Tennessee by any foreign or alien insurance company, as herein defined, shall be deemed to mean and include the doing in this state by such company of any act whatsoever, whether interstate or intrastate in nature, including the soliciting, making, or delivering of insurance contracts in Tennessee, by agent, mail, or otherwise.

Williams Tennessee Code #6459.49.

Section 3:

Appointment of commissioner as attorney—Any foreign or alien insurance company, before doing business in this state, as herein defined, shall, by written power of attor-

ney, appoint the commissioner of insurance and banking of the State of Tennessee, and his successor in office, its true and lawful attorney for the purposes hereinafter stated. Such appointment shall continue in force, irrevocably, as long as any liability of the company remains outstanding in this state.

Williams Tennessee Code #6459.50.

Section 4:

Doing business deemed such appointment.—If any such company shall do business in this state, as herein defined, without having appointed the commissioner of insurance and banking its true and lawful attorney, as required herein, it shall by doing such business in the State of Tennessee, be deemed to have thereby appointed the commissioner of insurance and banking its true and lawful attorney for the purposes hereinafter set forth.

Williams Tennessee Code #6459.51.

Section 5:

Preceding sections not in derogation of other provisions of law—The requirements of the preceding sections of this act shall be in addition to, and not in derogation of, any other provisions of law.

Williams Tennessee Code #6459.52.

Section 6:

Process or notice served on commissioner; when service may be made on secretary of state.—When the commissioner of insurance and banking has been appointed or constituted attorney for any such company, either by power of attorney or by failure to comply with the provisions of this act, any lawful process against or notice to such company in any action or proceeding against it growing out of such business may be served on the com-

missioner of insurance and banking, and filing such power of attorney or doing such business in Tennessee shall be a signification of its agreement that any such process or notice so served shall be of the same legal force and validity as if served upon it in the State of Tennessee. In case of any action or proceeding instituted by or on behalf of the commissioner of insurance and banking against or with reference to any such company, process may be lawfully served on the secretary of State of Tennessee.

Williams Tennessee Code #6459.53.

Section 7:

How service of process made; continuances; time of judgment. Service of process shall be made by leaving two copies of the process or notice, together with a fee of three dollars, in the office of the commissioner of insurance and banking, together with an affidavit giving the latest known address of the defendant, and such service shall be sufficient if notice of such service and a copy of the process or notice are forthwith sent by registered mail, with return receipt requested, by the commissioner of insurance and banking to the company at such latest known address. An affidavit of the commissioner of insurance and banking showing compliance herewith shall be filed with the papers in the action or proceeding. The court in which the action or proceeding is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action. No judgment shall be entered against any such defendant under this section until at least thirty days have elapsed after process or notice has been served on the commissioner of insurance and banking. The references in this section to the commissioner of insurance and banking, shall, in the case of any action or proceed-

ing instituted by or on behalf of the commissioner of insurance and banking, be deemed to refer to the Secretary of State of Tennessee, and the duties and responsibilities imposed by this section shall, in such cases, be performed and discharged by the secretary of state.

Williams Tennessee Code #6459.54.

Section 8:

Invalidity in part.—The provisions of this act are hereby declared to be severable. If any of its sections, provisions, exceptions, sentences, clauses, phrases or parts be held unconstitutional or void, the remainder of this act shall continue in full force and effect, it being the legislative intent now hereby declared, that this act would have been adopted even if such unconstitutional or void matter had not been included therein.

Williams Tennessee Code #6459.55.